SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1475

FRED E. WILSON - - - - - - Petitioner

versus

MERRITT S. DIETZ, JR., Commissioner, Department of Economic Security, Division of Public Assistance, Commonwealth of Kentucky - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Wilson v. Dietz, Com'r, etc.)
(U.S.C.A. 6th Cir. No. 71-1144)

ROBERT L. BERTRAM
West Cumberland Avenue
Jamestown, Kentucky 42629

MARTIN R. GLENN
Legal Aid Society of Louisville
422 West Liberty Street
Louisville, Kentucky 40202

Counsel for Petitioner

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. _____

FRED E. WILSON - - - - - *Petitioner*

v.

MERRITT S. DIETZ, JR., Commissioner, Department of Economic Security, Division of Public Assistance, Commonwealth of Kentucky - - - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Fred S. Wilson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 24, 1972.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit, not yet reported, appears as Appendix 1 hereto. The order of the District Court for the Western District of Kentucky appears as Appendix 2 hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 24, 1972. A timely petition for rehearing, together with a suggestion of the appropriateness of a rehearing *en banc*, was denied on April 4, 1972, and this petition for certiorari was filed within ninety (90) days of that date. The mandate of the Court of Appeals was issued on April 28, 1972. This Court's jurisdiction is invoked under 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether a state welfare recipient must object to a proposed termination of his or her grant, and request a hearing thereon, before being entitled to a fair evidentiary pre-termination hearing.

2. Whether a state welfare recipient is entitled to continue to receive benefits under his or her grant prior to a final and unappealable administrative decision based upon a fair evidentiary pre-termination hearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Fourteenth Amendment, Section 1:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws:

42 United States Code, Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 United States Code, Section 1343:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (3) To redress the deprivation, under color of State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

STATEMENT OF THE CASE

The instant action was brought under the Civil Rights Act (28 U. S. Code, Sec. 1343; 42 U. S. Code, Sec. 1983) by the petitioner Wilson in the United States District Court for the Western District of Kentucky as a class action on behalf of himself, individ-

ually and as representative of a class consisting of all other persons whose public assistance grants were terminated by the respondent Dietz, Commissioner of Kentucky Department of Economic Security, Division of Public Assistance, without a fair evidentiary pre-termination hearing.

The District Court ordered that the petitioner, and all other public assistance recipients who had objected to discontinuance of their Aid for Family With Dependent Children grant and requested a hearing thereon, be restored to the eligibility rolls and receive normal grant payments, retroactively and prospectively, until such time that the grant is "terminated at the administrative level by providing . . . an opportunity for a pre-termination evidentiary hearing and a hearing if such is requested." (See Appendix 2.)

The petitioner appealed to the United States Court of Appeals for the Sixth Circuit from so much of the order of the District Court that provides that a welfare recipient is not entitled to a fair evidentiary pre-termination hearing unless he or she objects to discontinuance of the grant and requests a hearing thereon. The petitioner also appealed from so much of the order that fails to provide that normal payments must be continued to a welfare recipient until the grant is terminated by a final and unappealable decision based upon a fair evidentiary pre-termination hearing.

The United States Court of Appeals for the Sixth Circuit affirmed the order of the District Court in its entirety (See Appendix 1).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decisions of This Court

The decision below is an erroneous interpretation of the decision of this Court in *Goldberg* v. *Kelly,* 397 U. S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011. That case can not be interpreted as merely giving a state welfare recipient an opportunity to take affirmative action to obtain a fair evidentiary pre-termination hearing.

The *Goldberg* case clearly, unequivocally and emphatically places upon the state agency an affirmative obligation to comply with each and all of the following due process requirements: Give to the recipient written notice of the proposed termination and the reasons assigned therefor; give to the recipient written notice of a fair evidentiary pre-termination hearing to be held at a meaningful time and place; give to the recipient effective opportunity to be present at the hearing, and to defend, present evidence, and confront and cross-examine adverse witnesses; render a decision by an impartial person, based upon legal rules of evidence, with a written statement of evidence and conclusions reached. Each and all of those steps were held necessary to constitute the procedural due process required by the Fourteenth Amendment of the Constitution of the United States in terminating a state welfare grant. Failure to comply with any one of those steps constitutes a denial of due process of law as guaranteed by the constitutional provision referred to

above. That is the real holding of this Court in the *Goldberg* case.

This Court followed the *Goldberg* case doctrine in the companion case of *Wheeler* v. *Montgomery,* 397 U. S. 280, 25 L. Ed. 2d 307, 90 S. Ct. 1026, decided on the same day.

This Court has subsequently applied the *Goldberg* case doctrine in the following cases: *Bell* v. *Burson, Director Georgia Department of Public Safety,* 402 U. S. 535, 29 L. Ed. 2d 90, 91 S. Ct. 1586 (1971), invalidating a state statute providing for suspension of a driver's license and automobile registration prior to a fair evidentiary hearing as to the reasonable probability of a judgment being obtained against the licensee. *Wisconsin* v. *Constantineau,* 400 U. S. 433, 27 L. Ed. 2d 515, 91 S. Ct. 507 (1971), invalidating a state statute providing for the posting of names of excessive drinkers without a prior fair evidentiary hearing.

None of the above decisions imposed upon the persons being proceeded against any requirement to request a fair evidentiary hearing. On the contrary, the decisions imposed upon the respective states the affirmative duty to schedule and hold same prior to administrative actions that amounted to deprivation of property rights or statutory entitlements.

One of the essential due process procedural requirements is "an impartial decision maker." *Goldberg* v. *Kelly,* 397 U. S. at 271, 90 S. Ct. at 1022. The decision maker at the administrative level in the Kentucky welfare hierarchy is not impartial. He or she

is an employee of the respondent and is subject to the supervision, direction, control, promotion and demotion of the respondent. Another of the essential due process procedural requirements is that "the decision-maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing." *Goldberg* v. *Kelly,* 397 U. S. at 271, 90 S. Ct. at 1022. The decision-maker at the administrative level in the Kentucky welfare hierarchy is not a lawyer and has no expertise in legal rules of evidence. Therefore, welfare payments should be continued pending an appeal by the recipient seeking judicial review of an administrative decision terminating benefits. As said in *Goldberg* v. *Kelly,* 397 U. S. at 261, 90 S. Ct. at 1017, the need to protect public tax revenues must be measured against the overwhelming brutal need of the destitute welfare recipient whose requirements for survival outweigh fiscal governmental aspects. "The stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great." *Goldberg* v. *Kelly,* 397 U. S. at 266, 90 S. Ct. at 1019.

2. The Instant Case Presents a Justiciable Controversy That Should Be Resolved by This Court

This Court is best able to delineate and apply the true meaning, scope and effect of its own decision in the *Goldberg* case, *supra.* This Court failed to do so in the recent case of *Richardson, Secretary of Health, Education and Welfare* v. *Wright* (February 24, 1972), ___ U. S. ___, 31 L. Ed. 2d 151, 92 S. Ct. ___, which

was remanded to the District Court without judicial action for administrative reprocessing under new Social Security Administration regulations. As pointed out by Mr. Justice Brennan's dissenting opinion in that case, joined in by Mr. Justice Douglas and Mr. Justice Marshall, the question presented therein (which is similar to the question presented in the instant case) "is being pressed all over the country."[1] Mr. Justice Brennan went on to say that under the *Goldberg* rule a fair evidentiary pre-termination hearing must be held before discontinuance of disability benefits being paid under the Social Security Act, and that failure of the Court to decide the question amounted to an abdication of its responsibility to resolve a dispute that is vital to the administration of an essential government program. The language of Mr. Justice Brennan is particularly significant when it is borne in mind that he delivered the opinion of this Court in the *Goldberg* case, *supra*.

Welfare recipients in Kentucky include numerous aged, blind, disabled, retarded and uneducated people. Less than ten percent of them have the advice and assistance of counsel. Most can not be expected to comprehend or comply with legalistic rules requiring affirmative action on their part for making known their objections to proposed discontinuance of their grant or for requesting a fair evidentiary pre-termination hearing. However all would understand a simple written statement of proposed termination, with reasons assigned therefor and notice of a fair evidentiary pre-termination hearing to be held thereon at a certain

[1] A foot-note cites 17 pending cases presenting the question.

time and place. The hearing itself is the best way, and in most instances the only way, to ascertain the objections of recipients to termination of their statutory entitlements, and to hear, even though ever so crudely or incoherently presented, their defenses to the proposed action. Compassionate realism, as well as judicial propriety, demands that this Court resolve the issues presented in the instant controversy.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

ROBERT L. BERTRAM
West Cumberland Avenue
Jamestown, Kentucky 42629

MARTIN R. GLENN
Legal Aid Society of Louisville
422 West Liberty Street
Louisville, Kentucky 40202

Counsel for Petitioner

May 2, 1972

APPENDIX

APPENDIX 1

No. 71-1144

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FRED E. WILSON - - - - - - *Plaintiff-Appellant*

v.

MERRITT S. DIETZ, JR., Commissioner, Department of Economic Security, Division of Public Assistance, Commonwealth of Kentucky - - - - - - *Defendant-Appellee*

APPEAL from the United States District Court for the Western District of Kentucky

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OPINION—Decided and Filed February 24, 1972

Before: EDWARDS, PECK and BROOKS,* Circuit Judges.

*Honorable Henry L. Brooks died on December 30, 1971.

EDWARDS, Circuit Judge. Appellant in this class action case appeals from portions of an order entered after hearing before the United States District Court for the Western District of Kentucky. Responding to appellant's complaint seeking injunctive relief from certain actions of the Kentucky Department of Economic Security, the District Judge, interpreting *Goldberg* v. *Kelly,* 397 U. S. 254 (1970), ordered defendant-appellee to restore appellant and all others similarly situated to the Aid to Families with De-

pendent Children (AFDC) rolls until such time as a pre-termination hearing had been held. The District Judge also ordered that retroactive payments be made to appellant and others similarly situated and that such payments be continued as to all who had objected to termination "in writing or otherwise" until the hearings had been held. Appellee has now complied with the terms of the District Court order. Appellant has been restored to the rolls, paid back benefits, granted a hearing, and, subsequent thereto, terminated.

Appellant's complaints in this court, however, are with the class action aspects of this case. Appellant says that *Goldberg, supra,* properly interpreted, requires the state to give a hearing in every instance prior to termination and not, as the District Judge's order required, merely send notice of termination setting forth the reason for termination and notifying the party if he objects that he has an opportunity for a hearing before termination of benefits.

Appellant also contends that *Goldberg, supra,* requires that AFDC recipients be kept on the rolls not only until there has been an evidentiary hearing, but also until through the appellate process "the termination decision becomes final and unappealable." Appellant's brief leaves no doubt that the appellate process referred to would encompass all available administrative and judicial appeals.

Appellant phrases the only issues raised on this appeal in these words:

> "1. Whether there must be a fair evidentiary hearing before a welfare recipient's benefits can be terminated.
>
> "2. Whether there must be a final and unappealable decision, based upon a fair evidentiary hearing, before a welfare recipient's benefits can be terminated."

We have read *Goldberg* v. *Kelly, supra,* with care and can find no such requirement as these contained therein. The very first sentence in Mr. Justice Brennan's opinion argues the contrary of both of appellant's propositions:

> "The question for decision is whether a State that terminates public assistance payments to a particular recipient *without affording him the opportunity for an evidentiary hearing prior to termination* denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment." *Goldberg* v. *Kelly, supra,* at 255. (Emphasis added.)

We have no doubt that if the Court had meant what appellant contends, the words "the opportunity for"[1] would have been deleted in the emphasized material, and after the word "hearing" there would have been added words like "and final appeal therefrom."

Lest is be suggested that this pins too much reliance upon an introductory sentence, we point out that there is much more in the *Goldberg* opinion bearing on both contentions:

> "As the District Court correctly concluded, '[t]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal.' 294 F. Supp. at 904-905.
>
> * * * * * * * *

---

[1]It should be noted that both statutes which provide for the benefits which are the subject of this case require that the state "provide an opportunity for a fair hearing before the state agency to any individual whose claim for aid . . . is denied." 42 U.S.C. §§ 602(a)(4) and 1352(a)(4) (1970).

"Accordingly, the pre-termination hearing has one function only: to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits. Cf. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 343 (1969) (HARLAN, J., concurring). Thus, a complete record and a comprehensive opinion, which would serve primarily to facilitate judicial review and to guide future decisions, need not be provided at the pre-termination stage. We recognize, too, that both welfare authorities and recipients have an interest in relatively speedy resolution of questions of eligibility, that they are used to dealing with one another informally, and that some welfare departments have very burdensome caseloads. These considerations justify the limitation of the pre-termination hearing to minimum procedural safeguards, adapted to the particular characteristics of welfare recipients, and to the limited nature of the controversies to be resolved. We wish to add that we, no less than the dissenters, recognize the importance of not imposing upon the States or the Federal Government in this developing field of law any procedural requirements beyond those demanded by rudimentary due process.

"'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914)." *Goldberg* v. *Kelly*, *supra* at 266-267.

We note that the paragraph above does not appear to invite the interpretations which appellant seeks in this case.

We recognize, of course that the questions posed by appellant in this appeal were not at issue before the Supreme Court in *Goldberg*. But it seems to us that the materials

quoted (and for that matter the whole of the opinion) tend to rebut rather than to support appellant's contentions that due process requires more than "the opportunity for an evidentiary hearing prior to termination," or that it requires a longer period of maintenance of payments than the time reasonably needed to hold a fair hearing and to decide the contested issues there considered.

We have read with interest the opinion in *Mott* v. *Betit*, Civil No. 6100 (D. Vt., filed Jan. 7, 1971), upon which appellant relies. Of course, it is not binding upon this court, and for reasons we have outlined above, we are not persuaded by it.

The judgment of the District Court is affirmed.

APPENDIX 2

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN

No. 1474

FRED E. WILSON - - - - - - - - *Plaintiff*

v.

MERRITT S. DEITZ, JR., etc. - - - - - *Defendant*

ORDER—Entered December 24, 1970

This cause having come on for hearing on December 11, 1970, pursuant to the Court's Order of December 1, 1970, and the Court having considered the pleadings and heard argument of counsel for each party, finds that the plaintiff, prior to July 1, 1970, was considered physically incapicitated for accessible employment, and his family eligible for Aid to Families with Dependent Children grant of public assistance under Chapter 205 of the Kentucky Revised Statutes; that on May 26, 1970, the plaintiff was informed by the Kentucky Bureau of Public Assistance that on and after July 1, 1970, the plaintiff and his family would be deemed ineligible for additional grants as his incapacity to work no longer existed; pursuant to said notice, and without affording the plaintiff opportunity for a pre-termination evidentiary hearing, the grant was stopped effective with the month of July, 1970, notwithstanding the fact that on

June 2, 1970, the plaintiff objected to and complained of the ineligibility determination.

The Court concludes as a matter of law that the failure to provide the plaintiff with an opportunity for a pre-termination evidentiary hearing violated the procedural due process requirements of the Bill of Rights and the Fourteenth Amendment and was in contravention of the rule handed down by the United States Supreme Court in *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), for which reasons it is directed that the defendant restore the plaintiff to the eligibility rolls for an AFDC grant under KRS Chapter 205 effective July 1, 1970, and that the plaintiff's normal grant payments be made to him, retroactive or otherwise, until such time as his eligibility is otherwise terminated at the administrative level by providing the plaintiff an opportunity for a pre-termination evidentiary hearing, and a hearing, if such is requested, in consonance with the procedural requirements set forth in *Goldberg* v. *Kelly*, supra.

The pleadings and statements by counsel also brought to the attention of the Court that other unnamed and otherwise unidentified public assistance recipients under KRS Chapter 205 have been removed from the eligibility rolls without being afforded the requisite pre-termination evidentiary hearings. The Court directs that all recipients that have been so removed and who have in writing or otherwise made known to the Social Worker or Bureau of Public Assistance that he or she objected to and complained of their removal and who have indicated a desire to be heard on the propriety of the discontinuance of their grant be restored to the eligibility rolls effective as of their individual cut-off date, and that money grants be made to them for the interim following said date and unto the date they are afforded an opportunity for a pre-termination evidentiary hearing in accordance with the rule laid down above with respect to the individual plaintiff herein.

The plaintiff's motion to proceed in forma pauperis is sustained.

This the 22 day of December 1970.

(s) Mac Swinford, *Judge*

12/24/70 Copies to:
Hon. Robert L. Bertram
Hon. Paul E. Tierney
Hon. James E. Childers
Hon. John B. Breckinridge, Attorney General

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JUN 5 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1475

FRED E. WILSON ---------- PETITIONER

vs.

MERRITT S. DEITZ, JR., as COMMISSIONER OF ECONOMIC SECURITY, etc., ---------- RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

PAUL E. TIERNEY
JAMES G. CHILDERS
Capitol Annex Building
Frankfort, Kentucky 40601

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NUMBER 71-1475

FRED E. WILSON ..... *PETITIONER*

vs.

MERRITT S. DEITZ, JR. COMMISSIONER, etc. ..... *RESPONDENT*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The respondent does not question the jurisdictional statement or the questions presented by the petitioner, however, it is believed that the statement of the case should be clarified.

COUNTER STATEMENT OF THE CASE

Except for the following, the respondent accepts the petitioners' statement.

In the second and third literary paragraphs of the statement contained on Page 4 of the Petition, the petitioner indicates that the District Court Order, which was affirmed by the Sixth Circuit Court of Appeals, required that a welfare recipient make a more or less formal request before the state agency is required to grant a pre-termination evidentiary hearing. Such is not so.

We direct the Court's attention to Appendix 2, the second literary paragraph on Page 17 of the Petition for Certiorari, and point out that the District Court directed, in part, as follows:

> "The Court directs that all recipients who have been so removed and who have in writing *or otherwise made known* to the Social Worker or Bureau of Public Assistance that he or she objected to, and complained of their removal, and who have indicated a desire to be heard on the propriety of the discontinuance of their grant, be restored to the eligibility rolls effective as of their individual cut-off date, and that money grants be made to them for the interim following said date, and unto the date they are afforded an opportunity for a pre-termination evidentiary hearing in accordance with the rule laid down above with respect to the individual plaintiff herein."

The Court had earlier in the Order directed that Wilson be returned to the eligibility rolls, given retroactive payments for the time he was off the rolls, and not again declared ineligible until he was granted an opportunity for a pre-termination evidentiary hearing. The respondent complied with the Court's Order, returned Wilson to the eligibility rolls, searched files to find those of his class, returned them to the rolls, and they were not again removed as ineligible until they were afforded opportunity for a pre-termination evidentiary hearing.

ARGUMENTS

QUESTION PRESENTED

1. WHETHER A STATE WELFARE RECIPIENT MUST OBJECT TO A PROPOSED TERMINATION OF HIS OR HER GRANT AND REQUEST A HEARING THEREON BEFORE BEING ENTITLED TO A FAIR EVIDENTIARY PRE-TERMINATION HEARING.

The petitioner has taken the position that the decision in *Goldberg v. Kelly*, 397 U. S. 254, 25 L. Ed. 2nd 287, 90 S. Ct.

1011, requires a state welfare agency to actually conduct a pre-termination evidentiary hearing before welfare payments to a recipient can be terminated (and now reduced). This position is maintained notwithstanding the recipients failure to make an objection to the proposed termination (after notification of the intent to terminate) or to otherwise complain about it. The respondent maintains that due process does not require the conduct of a hearing unless it is in some manner, formally or informally, indicated by the recipient that he desires to be heard.

The petitioner, on Page 5, second paragraph, very explicitly sets out the Goldberg requirements of due process. We agree that *Goldberg* does provide those guidelines, but we point out to the Court that nowhere is it stated in *Goldberg*, nor does the petitioner quote *Goldberg* as saying that a hearing must be conducted without the recipient indicating he wants to be heard. During the oral arguments before a Three-Judge panel in the Sixth Circuit Court of Appeals, Judge Edwards very pointedly asked of counsel for the petitioner, Mr. Glenn, "Where, in *Goldberg*, does it say that a hearing must be conducted, even though the recipient has not requested one or objected to the termination?" Counsel for the petitioner was not able to answer the question then, and they have not pointed out to this Court in their Petition where *Goldberg* mandates a hearing not requested by the affected recipient.

In fact, *Goldberg* is replete with the phrase, "*OPPORTUNITY FOR A HEARING*". We find in the Opinion of Justice Brennan, 397 U. S. 254 at Page 266, the following excerpt: (Our Emphasis)

> "As the District Court correctly concluded, '(t)he stakes are simply too high . . . to allow termination of aid without *giving the recipient a chance, if he so desires,* . . . to produce evidence in rebuttal' ". (Our Emphasis)

In *Goldberg*, in concurring, Justice Harlan wrote, at Page 267-271:

> "We . . . recognize the importance of not imposing . . . any procedural requirements beyond those demanded by rudimentary due process.
>
> The fundamental requisite of due process of law is the *opportunity* to be heard." *Grannis vs. Ordean,* 235, U. S. 385, 394 (1914). . . . These rights are important in cases such as those before us, where recipients have challenged proposed terminations. . . ."
>
> Further, Justice Harlan wrote, at Page 269: "In almost every setting, when important decisions turn on question of fact, due process requires an *opportunity* to confront and cross-examine adverse witnesses." Citations) (Emphasis ours).

At the time Wilson and his class were removed from the rolls, the Kentucky Agency had not had time to implement the new procedures required by *Goldberg.* It was admitted in the District Court that we had not complied. However, by the time the case came up for trial, the procedures had been established. After making the retroactive payments required by the District Court, the new procedures were employed, a pre-termination evidentiary hearing was conducted, after notice of the intent to terminate and after Wilson had requested it, and he was again terminated. He appealed through the administrative process and his case now is in the Kentucky Circuit Court pending being assigned for hearing.

The petitioner cites on Page 7 and 8 the case of *Richardson, Secretary of HEW, vs. Wright* (February 24, 1972), ____ U. S. ____ 31 L. Ed. 2nd 151, 91 S. Ct. _____. Mr. Justice Brennan's dissenting Opinion was brought to attention and it appears the petitioner represents it to be authority for the position they have taken in this case. We can not see where the petitioner gains any solace from Mr. Justice Brennan's Opinion. We refer the Court to *40 Law Week 4237,* where Mr. Justice Brennan wrote, in part, the following:

> ". . . If to provide prior hearings, terminations were delayed for two months, the Secretary says, the cost in

> benefits paid pending the hearing would approach $16 million. It is immediately apparent that this figure is grossly inflated.
>
> First, this figure depends upon the unwarranted assumption that all beneficiaries will demand a prior hearing. The Secretary suggests no reason to suppose that would happen.
>
> • • • • • •
>
> Second, the $16 million figure requires not only that all 38,000 beneficiaries request prior hearings, but also that they all lose.
>
> • • • • • •
>
> Third, not only must every beneficiary request a prior hearing and every hearing affirm cessation of disability, it must also be true to reach the $16 million figure that the Secretary will be unable to recover any of the benefits paid to the beneficiaries pending hearing."

It is obvious that Mr. Justice Brennan, who authored the Opinion of the Court in *Goldberg vs. Kelly, supra,* recognizes that a pre-termination evidentiary hearing is not necessary unless the recipient requests it. Mr. Justice Brennan used the words "demand a prior hearing".

In addition to the above authority that a request must be made before it is necessary to conduct a hearing, we refer the Court to 45 C. F. R. 205.10 (a) (3) where under the procedures adopted by the Department of Health, Education & Welfare, for the administration of the public assistance programs, it requires that a State give opportunity for a hearing to any individual who requests a hearing, and the regulation goes on in the next paragraph (i) and defines what shall be accepted as a request for a hearing. The regulation was adopted after *Goldberg* was handed down.

It has been suggested that if the agency did set up a hearing and drag the unwilling recipient into attendance at it, although the hearing was not requested, that the agency or its personnel

would be violating some other Constitutional right of the recipient.

QUESTION PRESENTED

2. WHETHER A STATE WELFARE RECIPIENT IS ENTITLED TO CONTINUE TO RECEIVE BENEFITS UNDER HIS OR HER GRANT PRIOR TO A FINAL AND UNAPPEALABLE ADMINISTRATIVE DECISION BASED UPON A FAIR EVIDENTIARY PRE-TERMINATION HEARING?

We believe a fair interpretation of this question would be that a recipient would be maintained on the rolls throughout the period that statutes and regulations provide for him to appeal adverse decisions. We believe that it would mean that although a recipient was determined ineligible after a pre-termination evidentiary hearing, he would remain on the rolls until a fair hearing was conducted if he appealed the previous determination; that if he again appealed from the fair hearing decision, he would remain on the rolls until the Appeal Board handed down the last available administrative hearing, and if he appealed to the Kentucky Courts, he would remain on the rolls until the Kentucky Court of Appeals passed on the case, and then possibly he would have an appeal to the Supreme Court. As most welfare recipients make their administrative and judicial appeals in forma pauperis, it would mean that if they so desired, that they could remain on the rolls for one and one-half to two and one-half years, merely by availing themselves of the appellate procedures. It would mean that the Supreme Court of the United States or the Court of Appeals of Kentucky would decide the eligibility or ineligibility of all welfare recipients.

The import of the situation makes it border on the ridiculous. This is especially so when we look at *Goldberg* and its background and see how it arose. We call to the Court's attention that *Goldberg* was brought up to determine the constitutionality of a

procedure followed by the New York City agency. The procedure contested was that the New York City agency would inform a recipient that he was to be removed from the rolls and only affording him the opportunity to write a letter back indicating why he shouldn't be removed. This Court, in *Goldberg*, said such would not serve due process; that opportunity for confrontation should be had with the right to cross-examine, etc. Once a due process pre-termination evidentiary hearing is conducted, it is permissible to remove the recipient from the rolls if the evidence supports such action. Such reduces the chance of error or misjudgment and satisfies all constitutional rights a person has to welfare benefits.

CONCLUSIONS

The respondent respectfully submits that the two lower courts properly decided the issues made in this case, and that the Writ of Certiorari should be denied.

Respectfully submitted,

PAUL E. TIERNEY
JAMES G. CHILDERS
Capitol Annex Building
Frankfort, Kentucky 40601
Attorneys for Respondent

SUPREME COURT, U. S.

JUL 14 1972

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1971

No. 71-1475

FRED E. WILSON, - - - - - - Petitioner

versus

MERRITT S. DEITZ, JR., Commissioner, Department of Economic Security, Division of Public Assistance, Commonwealth of Kentucky, - - - - - Respondent

On Petition For Writ of Certiorari to United States Court of Appeals For Sixth Circuit

PETITIONER'S REPLY BRIEF

ROBERT L. BERTRAM
West Cumberland Avenue
Jamestown, Kentucky 42629

MARTIN R. GLENN
Legal Aid Society of Louisville
422 West Liberty Street
Louisville, Kentucky 40202
Counsel for Petitioner

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1971

No. 71-1475

FRED E. WILSON, - - - - - - *Petitioner*

v.

MERRITT S. DEITZ, JR., Commissioner, Department of Economic Security, Division of Public Assistance, Commonwealth of Kentucky, - - - *Respondent*

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERITORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, referred to at page 1 of the petition for a writ of certiorari, has now been reported at 456 F. 2d 314.

PURPOSE OF THIS BRIEF

The purpose of this reply brief is to show that arguments raised in the respondent's brief are without merit, and to correct mis-statements of law and fact contained therein.

ARGUMENT

1. Respondent's Procedure is Not in Compliance With Goldberg v. Kelly

Respondent's brief (page 4) states that "At the time Wilson and his class were removed from the rolls, the Kentucky Agency had not had time to implement the new procedures required by *Goldberg.*" That is not true. *Goldberg* v. *Kelly,* 397 U. S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011, was decided March 23, 1970. The petitioner's grant was terminated effectice July 1, 1970. Respondent did not reinstate the petitioner or any member of the class, or make retroactive payment, until compelled to do so by the order of the District Court entered December 24, 1970.

Respondent's brief (page 2) claims that the Kentucky welfare agency became in compliance with the *Goldberg* decision by restoring to the welfare rolls and paying retroactively, all persons who, having requested a pre-termination evidentiary hearing, were removed from the rolls without such a hearing. That is untrue. Compliance with the *Goldberg* requirement of a pre-termination evidentiary hearing is not contingent upon a request therefor by the welfare recipient. The statement in respondent's brief, referred to above, is an admission that numerous welfare grants have been terminated where the recipients have not expressly requested pre-termination evidentiary hearings, and that such persons have not been restored to the rolls or received retroactive payments. The respondent has continued to follow that policy, which is contrary to the

Goldberg decision and in violation of the due process provisions of the Fourteenth Amendment of the United States Constitution.

2. Class Action Aspects are Presented for Review

Respondent's brief (page 4) states that the petitioner was finally granted an evidentiary hearing upon his express request therefor, as a result of which his benefits were terminated. That is untrue. The decision of the hearing officer was in favor of the petitioner, but it was reversed by the respondent upon review by him. That case is now pending on appeal in the state court.

It should be borne in mind that this federal court case is a class action. The opinion of the United States Court of Appeals noted that "Appellant's complaints in this court, however, are with the class action aspects of this case" (see Appendix 1 to Petition for Writ of Certiorari, page 12). Numerous persons who are members of the class represented by petitioner Wilson are affected by this federal court case (see Appendix 2 to Petition for Writ of Certiorari, pages 16-18).

3. Express Objection to Termination and Request for Hearing is Not Required

Respondent's brief (page 3) states that petitioner's counsel has been unable to point out to the United States Court of Appeals or to this Court anything in the *Goldberg* case that says that "a hearing must be conducted, even though the recipient has not requested

one or objected to the termination." That is not true. Although the factual issues in the Goldberg case may not have involved the precise question, counsel for the petitioner have consistently and vigorously argued in the District Court, and in the Court of Appeals, and in this Court, that the whole tenor, import and effect of the *Goldberg* decision is to require a pre-termination evidentiary hearing before welfare benefits can be discontinued, and that failure of a welfare recipient to expressly object to termination, or to expressly request an evidentiary hearing thereon, does not constitute a consent to termination.

Respondent's brief (page 4) cites *Grannis* v. *Ordean,* 235 U. S. 385, 394, as holding that the requisite of due process of law is the opportunity to obtain a hearing. In the later case of *Mullane* v. *Central Hanover Bank and Trust Co.,* 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865, this Court cited and amplified the *Grannis* case as follows:

> " 'The fundamental requisite of due process of law is the opportunity to be heard.' Grannis v. Ordean, 234 U. S. 385, 394, 34 S. Ct. 779, 783, 58 L. Ed. 1363. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiese or contest."

This Court has never held that a request for a hearing is a condition precedent to the right to a hearing under the due process clause of the Fourteenth Amendment. See: *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337, 343, 89 S. Ct. 1820, 1823, 23 L. Ed. 2d 349;

Goldberg v. *Kelly,* 397 U.'S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287; *Wisconsin* v. *Constantineau,* 400 U. S. 433, 27 L. Ed. 2d 515, 91 S. Ct. 507; *Bell* v. *Burson,* 402 U. S. 535, 29 L. Ed. 2d 90, 91 S. Ct. 1586.

Lower courts have not interpreted the above decisions of this Court as requiring a request for a hearing as a condition precedent to the right to a hearing under the Fourteenth Amendment. See: *Pack v. Deitz, Commissioner* (Kentucky Court of Appeals) 455 S. W. 2d 575; *Lage* v. *Downing,* (U.S.D.C. So. Dist. Iowa) 314 F. Supp. 904; *Merriwether* v. *Burson* (U.S.D.C. No. Dist. Georgia) 325 F. Supp. 709, affirmed 439 F. 2d 1092; *Mott* v. *Betit* (U.S.D.C. Dist. of Vermont) Civil Action No. 6100, all holding that an evidentiary pre-termination hearing is required before discontinuance of welfare benefits. *Wright* v. *Finch, Secy.,* (U.S.D.C. Dist. of Columbia) 321 F. Supp. 383, holding an evidentiary pre-termination hearing is required before discontinuance of social security benefits. *Crowe* v. *California Department of Human Resources,* (U.S.D.C. No. Dist. California) 325 F. Supp. 1314, holding that termination of unemployment compensation requires a prior evidentiary hearing. *Holt* v. *Brown* (U.S.D.C. West'n Dist. Kentucky) 336 F. Supp. 2; *Santiago* v. *McElroy* (U.S.D.C. East'n Dist. Pennsylvania) 319 F. Supp. 284, and *Hall* v. *Garson* (5th Cir.) 430 F. 2d 430, all holding invalid state distress for rent statutes that did not provide for pre-seizure evidentiary hearings. *Laprease* v. *Raymours Furniture Co.,* (U.S.D.C. No. Dist. N.Y.), 315 F. Supp. 716, holding invalid a state replevin statute that did not provide for a pre-

seizure evidentiary hearing. Numerous other decisions of lower federal and state courts have failed to interpret the Supreme Court decisions cited above as making a request for a hearing a condition precedent to the right to a hearing. The opinion and judgment of the United States Court of Appeals for the Sixth Circuit, which petitioner seeks to have reviewed by this Court, is unique in that it appears to be the only decision making a request for a hearing a condition precedent to the right thereto.

Respondent's brief (page 5) states that a request for a pre-termination hearing is required by regulations adopted by the U. S. Department of Health, Education and Welfare. It is of course axiomatic that neither statutory enactments nor administrative regulations thereunder can over-ride constitutional guarantees of due process of law.

4. Due Process Includes Judicial Review

Respondent's brief (pages 6-7) states that if welfare recipients are continued on the welfare rolls pending judicial appeal, virtually every case of termination of welfare benefits would ultimately be appealed to this Court. That is not true.

The right to judicial review is an indispensable concomitant to the right to an administrative hearing. Especially where, as in the Kentucky welfare hierarchy, hearing officers are not impartial, legally-trained referees, and frequently have their decisions summarily overruled and reversed by the administrative head of the agency. Welfare benefits terminated in the ad-

ministrative process should be continued during the time that the recipient has in which to seek at least one judicial review and also during the time that such an appeal to the appropriate court is pending.

As said by this Court in the *Goldberg* case, the need to protect the public's tax revenues must be balanced against the individual's overpowering need not to be wrongfully deprived of assistance, and weighed in favor of the destitute welfare recipient whose brutal need for survival outweighs governmental fiscal aspects. "The stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment to great." *Goldberg* v. *Kelly,* 397 U. S. 261, 265, 266; 90 S. Ct. 1017, 1019.

CONCLUSION

For the reasons set out herein and in the petition for a writ of certiorari, there should issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

ROBERT L. BERTRAM
West Cumberland Avenue
Jamestown, Kentucky 42629

MARTIN R. GLENN
Legal Aid Society of Louisville
422 West Liberty Street
Louisville, Kentucky 40202

Counsel for Petitioner

June 12, 1972